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No. 91-954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RAFAEL SANTIAGO,

Petitioner,

—against—

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner, an employee of respondent New York State Department of Correctional Services ("DOCS"), a state agency, commenced this action in the United States District Court for the Southern District of New York, alleging, *inter alia*, a violation of his rights under the Fourteenth Amendment of the United States Constitution and seeking an award of damages against DOCS for pain and suffering, as well as an injunction prohibiting DOCS from retaliating against him. The district court held that monetary relief in an action brought under the Fourteenth Amendment is not barred by the Eleventh Amendment. The opinion is reported at 725 F. Supp. 780 (S.D.N.Y. 1990). The United States Court of Appeals for the Second Circuit unanimously reversed in an

opinion reported at 945 F.2d 25 (2d Cir. 1991). Because the Circuit Court correctly applied the decisions of this Court, taking proper account of the balance established by the Court between these two amendments, and because there is neither a conflict among the circuits nor any other basis for granting a writ of certiorari, respondent urges that the petition for such review be denied.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner is an Hispanic corrections officer employed by DOCS. In June, 1987, following an altercation with a supervisor, he requested and was granted a leave of absence. (JA. 4, 5).[1]

In late June, 1987, petitioner's treating psychologist advised DOCS that petitioner would be able to resume work by July 15, 1987, the expiration date of his leave. (JA. 5). Pursuant to applicable Civil Service regulations, petitioner was referred to the Employee Health Service ("EHS"), a Division of the Department of Civil Service, for an examination to determine whether he could return to work without jeopardizing the health and welfare of other employees. (JA. 6, 15, 66). Petitioner was examined by a physician employed by EHS and by a consulting clinical psychologist. (JA. 16).

Petitioner was then referred to Dr. Melvin Steinhart for an additional psychiatric examination. Dr. Steinhart is an outside consultant and is not employed by the EHS. Based upon his examination, Dr. Steinhart recommended that petitioner's medical leave be continued. (JA. 6, 15, 16).

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1 Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix in the Court below. Numbers in parentheses followed by the letter "a" refer to pages in the Appendix to the Petition for a Writ of Certiorari.

On August 13, 1987, petitioner was notified he would be placed on an involuntary leave of absence pursuant to New York Civil Service Law § 72(5). (JA. 6, 16). Petitioner objected to imposition of the leave and, pursuant to Civil Service Law § 72(1), requested a hearing to appeal this determination. (JA. 7).

On September 15, 1987, petitioner was re-examined by Dr. Steinhart. Based on this examination, Dr. Steinhart concluded that petitioner was mentally unfit to perform the duties of a corrections officer. (JA. 16).

In October, 1987, a hearing was held on petitioner's appeal (JA. 16-17), at which petitioner was represented by counsel. (JA. 121). The hearing officer determined that petitioner was unable to perform the full duties of a corrections officer by virtue of a medical disability. (JA. 6-7).

Pursuant to Civil Service Law § 72(3), petitioner appealed this determination to the Civil Service Commission, which considered plaintiff's appeal at its April 14, 1988 meeting. The Commission concluded that the facts and evidence in the record did not support DOCS' determination to place petitioner on involuntary leave. Accordingly, the decision of the hearing officer was reversed, petitioner was restored to his position, and DOCS was ordered to restore the leave credits and salary which petitioner had lost during the involuntary leave of absence. (JA. 7, 66).

B. Proceedings in the District Court

Petitioner commenced this action on March 28, 1989, against DOCS and Dr. Steinhart. Petitioner claimed that both defendants had violated his rights under 42 U.S.C. §§ 1981 and 1983, and under the Equal Protection Clause of the Fourteenth Amendment. (JA. 9). In addition, petitioner asserted that Dr. Steinhart had conspired with DOCS personnel, in violation of 42 U.S.C. § 1985(3) (JA. 8), and that as part of that conspiracy, Dr. Steinhart had "prepared a materially misleading and false report . . . which [DOCS] relied upon in finding [petitioner] unfit." (JA. 6). According to

petitioner, DOCS' application of section 72 of the Civil Service Law was part of a pattern of systematic and intentional discrimination against minority (Black and Hispanic) corrections officers. (JA. 8). However, the complaint contained no statistical or other substantiation of the alleged pattern. Plaintiff sought compensatory and punitive damages, together with an injunction prohibiting DOCS from retaliating against him.[2] (JA. 7, 9-10).

On May 31, 1989, DOCS filed a motion to dismiss the complaint, *inter alia*, on the ground that the Eleventh Amendment to the United States Constitution is an absolute bar to the maintenance of this action. (JA. 12-13). In response to DOCS' motion, petitioner conceded that his § 1981 and 1983 claims were barred by this Court's decisions in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), respectively, but maintained that he still had a valid claim for damages against DOCS directly under the Equal Protection Clause of the Fourteenth Amendment. (JA. 14).

On November 29, 1989, the district court granted DOCS' motion to dismiss the claims based on 42 U.S.C. §§ 1981, 1983 and 1985(3), but held that the Eleventh Amendment is not a bar to petitioner's claim under the Fourteenth Amend-

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2 The fourth question which petitioner seeks to raise before this Court is whether, "in a suit predicated on a state policy and practice," he was required to name individuals as defendants "or lose his right to obtain injunctive relief." In fact, however, petitioner did not seek to enjoin the alleged DOCS' policy upon which his claim is based, even though his analysis of the Fourteenth Amendment would permit the granting of injunctive relief against the State or one of its agencies. Therefore, his question addresses a concern which is not present in this case. Moreover, this Court has unequivocally and consistently held that individuals must be named in order to obtain prospective injunctive relief against alleged unlawful state policies. *See e.g. Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Kentucky v. Graham*, 473 U.S. 159 (1985).

ment.[3] The court based its conclusion on the fact that the Fourteenth Amendment was enacted subsequent to the Eleventh Amendment and expressly provides that "no state shall . . . deny to any person within its jurisdiction equal protection of the law." U.S. Const. Amend. XIV. In the court's view, the Fourteenth Amendment "expresses the intent of Congress and the States to have the equal protection clause apply to the States despite the doctrine of sovereign immunity." (32a).

Both DOCS and Dr. Steinhart moved for reargument. On reargument, DOCS argued that in analyzing whether a direct cause of action lies under the Fourteenth Amendment against a state agency, the court failed to consider the availability of claims under § 1983. The court rejected this argument, stating that "[a] Section 1983 claim against the State is unavailable here because the intention of Congress in enacting Section 1983 was not to include State agencies within the term 'person.' " 734 F. Supp. 653, 654 (S.D.N.Y. 1990) (citation and footnote omitted.) The court denied both defendants' motions to reargue in their entirety. (A.51).

C. Decision of the Court of Appeals

On appeal, the Court of Appeals for the Second Circuit reversed. The court characterized petitioner's argument as "facile" insofar as it was based on the chronological order in which the amendments were adopted. (7a). In the face of the "complex and flexible relation" between the amendments reflected in the decisions of this Court, the court refused to accept the "notion that the later amendment simply erased the earlier." (*Id.*).

The court found that although there are two exceptions to the jurisdictional bar of the Eleventh Amendment, neither

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3 The court dismissed the claims under § 1985(3) since petitioner "fail[ed] to satisfy section 1985(3)'s threshold requirements of a conspiracy between 'two or more persons.' " (22a). The court also granted the motion by Dr. Steinhart to dismiss the § 1983 claim against him, in his official capacity, but denied it insofar as he was named in his personal capacity. (27a). Dr. Steinhart did not appeal.

was satisfied in this case. It rejected petitioner's argument that because Section 1 of the Fourteenth Amendment imposes substantive duties on the States it is a "clear statement" by Congress of its intent to abrogate the States' immunity from actions for damages. (11a). The court noted that the language of the Section "nowhere expresses [such] an intent" (*Id.*), and further noted that in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court found that the States' immunity had been abrogated only on the basis of an express enactment by Congress under Section 5 of the Fourteenth Amendment. In light of this Court's statement in *Bitzer*, that under Section 5 Congress may provide for suits which are "constitutionally impermissible in other contexts," it concluded that, absent a Congressional enactment, "Section 1 alone" is insufficient to overcome Eleventh Amendment immunity. (12a).

The court also rejected petitioner's claim that the States had waived their Eleventh Amendment immunity when they ratified the Fourteenth Amendment. It found that petitioner had failed to demonstrate that ratification, in and of itself, satisfied the strict requirements for a waiver reaffirmed by this Court in *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). (14a).

REASONS FOR DENYING THE WRIT

1. The Second Circuit Correctly Decided That Neither Exception To The Eleventh Amendment Applies

Beginning with *Ex parte Young*, 209 U.S. 123 (1908), this Court has developed, and consistently reaffirmed, a dichotomy with respect to the type of relief a private litigant may obtain from the State in the face of the Eleventh Amendment. The Court has held that prospective injunctive relief may be obtained against a state officer, even if it impacts on the State's treasury, *Milliken v. Bradley*, 433 U.S. 267 (1977), whereas neither injunctive relief, *Papasan v. Allain*, 478 U.S. 265 (1986), nor an award of damages is available against the State or any of its alter egos. *Edelman v. Jordan*, 415 U.S.

651 (1974) (state official sued in his official capacity); *Florida Department of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam) (state agency). Only where there has been an express waiver by the State, cf. *Edelman*, 414 U.S. at 673, or an explicit Congressional enactment overriding the State's immunity, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), has the Court refused to apply the Eleventh Amendment bar in an action for damages.

The dichotomy represents an attempt to balance the undisputed interests at stake under both amendments. As the authors of one treatise recently observed:

> The Eleventh and Fourteenth Amendments . . . pull in completely opposite directions. While the Eleventh Amendment seeks to protect the states from federal court liability, the Fourteenth Amendment imposes obligations on the states, and § 1983 contemplates that these obligations be enforced in court. Little wonder, then, that Eleventh Amendment decisional law reflects the compromises necessary to resolve the tension between the Eleventh and Fourteenth Amendments.

Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees*, § 6.3 (1986). *See also Dellmuth v. Muth*, 491 U.S. 223, 227 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-239 (1985).

Although petitioner does not acknowledge it, if accepted, his argument that the Fourteenth Amendment, in and of itself, overrides the Eleventh, would require the Court to abandon this carefully developed jurisprudence. Indeed, throughout his brief, petitioner seeks to reargue the premises which underlie this line of cases. Pet. Br. pp. 23, 37-38. The Court of Appeals correctly refused to engage in this exercise. Instead, it reached the result compelled by this Court's decisions, i.e., that the Eleventh Amendment bars the relief petitioner seeks.

The decision below is plainly correct because petitioner failed to establish that either exception to the Eleventh

Amendment applies. Thus, petitioner argues that "a clear reading," Pet. Br. p. 21, of the "plain language" of Section 1 of the Fourteenth Amendment, leads to the "undeniable conclusion," Pet. Br. p. 29, that Congress intended to abrogate the Eleventh Amendment. As the court below recognized, however, although the prohibitions of Section 1 apply expressly to the States, the conclusion urged by petitioner does not follow from the general language of the provision. In contrast to Congressional enactments which have been found to express the requisite intent, it is not "unmistakably clear in the language" of the Section itself that abrogation was intended. *Atascadero*, 473 U.S. at 242; *Dellmuth v. Muth*, 491 U.S. at 228. *See also Hilton v. South Carolina Public Railways Commission*, __ U.S. __, 60 USLW 4056, 4058 (Dec. 16, 1991), reaffirming the applicability of the clear statement rule where, as here, a constitutional provision is implicated. There is, in fact, no language in Section 1 which exhibits such an intent on the part of Congress.[4] Given " 'the vital role of the doctrine of sovereign immunity in our federal system,' " *Atascadero*, 473 U.S. at 242 (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [1984]), there is no less need for "unmistakably clear" language in a self-executing constitutional provision such as Section 1, than in a statute enacted pursuant to an enabling provision like Section 5 of the Fourteenth Amendment.

Petitioner, citing this Court's recent decision in *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991), disputes the logic of applying the "unmistakably clear" language rule to a provision enacted prior to adoption of this rule. Pet. Br. p. 27. However, as the dissent points out in *Blatchford*, the Court did apply the rule in that case. 111 S. Ct. at 2587. Similarly, in *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 458 (1987), the Court applied the rule to the Jones Act, 46 U.S.C. § 688(a), a statute originally enacted in 1915 and amended in 1921 to read as

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4 Petitioner concedes as much by relying elsewhere on the *absence* of any language which limits the reach of the Amendment. Pet. Br. p. 26.

it does today. The Court found lacking in this early twentieth century statute the requisite clear expression by Congress of its intention to override the Eleventh Amendment. *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) in which the Court, in holding that the State could not be sued under 42 U.S.C. § 1983, relied, in part, on the absence of any "clear statement" in section 1983 of a contrary intent on the part of Congress. Section 1983 was enacted in 1871.

Moreover, even if the clear statement rule is inapplicable, as petitioner suggests, he is in no better position because he has failed to point to any evidence supporting his thesis that the 39th Congress intended to permit a plaintiff to recover damages from a State for a Fourteenth Amendment violation. Instead, it appears that the framers never considered the possibility of such an award. John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1454, 1458-59 (1975) ("There are no extant materials from the drafting or debate of the fourteenth amendment which indicate that the framers of that amendment ever considered whether it would be possible for a private citizen to sue a state government for damages in a federal court because the state had violated the principles of the amendment.") This Court recognized as much in *Quern v. Jordan*, 440 U.S. 332, 343, 345 (1979) insofar as it held, *inter alia*, that nothing in the "circumstances surrounding the adoption of the Fourteenth Amendment" indicated that 42 U.S.C. § 1983 was intended to abrogate the Eleventh Amendment. Accordingly, petitioner's analysis fails regardless of whether the clear statement rule applies.

Petitioner's assertion that the States waived their immunity to suits for damages when they ratified the Fourteenth Amendment is similarly unsupported. This Court has emphasized that a waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reason-

able construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 [1909]). The test for finding a voluntary waiver is a "stringent one." *Atascadero*, 473 U.S. at 241.

Petitioner has not met this test. He points to no "express language" or "overwhelming" textual implications, but relies instead, as he did below, on the bare assumption that by agreeing to adoption of the substantive provisions of Section 1 of the Fourteenth Amendment, the States also agreed to waive their immunity from actions for damages. The court below correctly refused to credit this undocumented assumption.

2. Petitioner's Analysis Is Inconsistent With This Court's Decisions In Fitzpatrick v. Bitzer, Quern v. Jordan, and Will v. Michigan Dept. of State Police

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court stated that "Congress may, in determining what is 'appropriate legislation' [under Section 5 of the Fourteenth Amendment] provide for private suits against States or State officials *which are constitutionally impermissible in other contexts*." 427 U.S. at 456 (emphasis added). If Section 1 of the Fourteenth Amendment, without more, abrogated the Eleventh Amendment, as petitioner contends, a suit against the State in the absence of Section 5 legislation would not be "constitutionally impermissible." *See Jagnandan v. Giles*, 538 F.2d 1166, 1185 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). *Fitzpatrick* thus makes clear that Section 1 does not itself override the Eleventh Amendment.

Shortly thereafter, in *Quern v. Jordan*, 440 U.S. 332 (1979), the Court explicitly held that section 1983 did not abrogate the Eleventh Amendment. Although the Court recognized that the Act ceded to the federal government many powers previously held by the States, as noted, *supra*, at page 9, it held that "neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of [§ 1983] compels, or even warrants, a leap

from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States." 440 U.S. at 342. The Court elaborated:

> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42nd Congress believed that [§ 1983] overrode that immunity, surely there would have been lengthy debate on this point. . . . [S]ilence on the matter is itself a significant indication of the legislative intent. . . .

Id. at 343. The inference to be drawn from these statements, as the court below determined, is not simply that section 1983 did not override the Eleventh Amendment, but also, that the States' "traditional sovereign immunity," as embodied by the Eleventh Amendment, was intact when the 42nd Congress enacted section 1983 three years after the ratification of the Fourteenth Amendment in 1868.[5]

This inference is reaffirmed by the Court's analysis in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). In holding that a State is not a "person" under section 1983, the Court based its conclusion, *inter alia*, on the fact that "Congress, in passing § 1983, had no intention to disturb the State's Eleventh Amendment immunity and so to alter the federal-state balance in that respect. . . ." 491 U.S. at 66. That much, it noted, "was made clear in our decision in *Quern*." *Id.* If the Fourteenth Amendment had itself overridden the Eleventh Amendment, there would, of course, have been no immunity to "disturb" when Congress enacted section 1983. Moreover, because section 1983 was intended to enforce the Fourteenth Amendment, *Mitchum v. Foster*, 407 U.S. 224, 249 (1972), there can be no question that the "Eleventh Amendment immunity" referred to in *Will* was the States' immunity from monetary liability for alleged violations under the Fourteenth Amendment.

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5 Indeed, in *Ex parte Young*, 209 U.S. 123, 150 (1908), the Court expressly assumed that the Eleventh Amendment retained its scope and effect.

Notably, petitioner fails to address the fact that acceptance of his argument would render irrelevant most, if not all of the decisions which have elaborated the relationship between the Eleventh and Fourteenth Amendments. Instead, he presents his thesis in a vacuum, without regard to consequences and, more importantly, without any firm basis in fact or law. The court below, in applying the decisions of this Court, correctly refused to credit petitioner's rhetoric. This Court should refuse to do so, as well.

3. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals

The decision below is in accord with the decisions of other circuit courts which have considered the issue of whether the Fourteenth Amendment limits the States' sovereign immunity under the Eleventh Amendment, and petitioner does not claim otherwise. *See Vakas v. Rodriguez*, 728 F.2d 1293 (10th Cir. 1984); *Jagnandan v. Giles*, 538 F.2d 1166, 1185 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) ("The very fact that the *Fitzpatrick* Court relied on legislation, authorized by the enabling section of the Fourteenth Amendment, supports the necessity of such legislation for recovery of money from the state by a person whose Fourteenth Amendment rights have been violated."); *Townsend v. Edelman*, 518 F.2d 116 (7th Cir. 1975). Similarly, except for the district court in this case, the district courts which have considered the issue have refused to find that the Eleventh Amendment is overridden by the Fourteenth. *See e.g. United States v. DCS Development Corp.*, 590 F. Supp. 1117 (W.D.N.Y. 1984); *Henry v. Texas Tech University*, 466 F. Supp. 141 (N.D. Texas 1979); *Holladay v. Roberts*, 425 F. Supp. 61 (D.C. Miss. 1977). Accordingly, there is no conflict which requires resolution by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
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